UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GILDAY SEAFOOD, INC., et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 97-215-P-DMC***
	)	
COBURN INSURANCE AGENCY, INC., et al.,	***)***	
	)	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT[1]

The defendants, Coburn Insurance Agency, Inc. ("Coburn") and David Berno, an employee of Coburn, move for summary judgment on all counts of the complaint in this removed action, which arises out of the alleged failure of the defendants to obtain workers' compensation insurance for plaintiff Gilday Seafood, Inc. ("GSI"). I grant the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The summary judgment record reveals the following undisputed facts. GSI was incorporated in 1988. Secretary of State's Certificate, Exh. 5 to Statement of Material Facts Submitted by Defendants ("Defendants' SMF") (Docket No. 7). Emile Pelchat was an employee of GSI who suffered an injury arising out of and in the course of his employment on February 25, 1991. Plaintiffs['] . . . Responses to First Set of Request [sic] for Admissions Propounded by Defendants ("Plaintiffs' Admissions"), Exh. 2 to Defendants' SMF, Nos. 17 & 18. By decision dated July 21, 1993, the Maine Workers' Compensation Board found that Pelchat's injury was compensable under the Maine Workers'

Compensation Act. State of Maine Workers' Compensation Board Decision, *Emile Pelchat v. Gilday Seafood Company & Hanover*, Exh. 3 to Defendants' SMF, at [6]-[7]. GSI was a party to the proceeding before the Board; plaintiff Timothy Gilday ("Gilday") was not. *Id*. at [1]. Gilday was an owner and the president of GSI. Deposition of Timothy B. Gilday ("Gilday Dep."), Exh. 1 to Defendants' SMF, at 10-11.

GSI's corporate charter was suspended by the Maine secretary of state effective April 20, 1994. Exh. 5 to Defendants' SMF. At his deposition, Gilday testified that GSI "doesn't exist anymore," that he has "no idea what became of it," and that it has not existed for four or five years. Gilday Dep. at 12. A notice of cancellation dated April 4, 1990 from Hanover Insurance Co. stated that the workers' compensation policy issued to GSI would be canceled effective May 7, 1990 for non-payment of premium. Exh. 6 to Defendants' SMF; Plaintiffs' Admissions No. 1. GSI did not have workers' compensation insurance in effect on the date of Pelchat's injury. Plaintiffs' Admissions No. 19.

The complaint alleges that defendant Berno represented to Gilday on November 29, 1990 that he would obtain workers' compensation insurance for GSI and that GSI issued a check on that date to "install" such insurance for one year beginning on that date. Complaint (Docket No. 1a) ¶¶ 8-9. The check was in the amount of $7,138 and bore the payment description "liability, comp and cargo." *Id*. ¶ 9; Deposition of David M. Berno, Exh. 10 to Defendants' SMF, at 46.

The complaint in this action was filed in the Maine Superior Court, York County, on February 24, 1997. State Court Docket Sheet, attached to Affidavit of James C. Hunt (Docket No. 3).

III. Analysis

A. Statute of Limitations

Count II of the complaint alleges breach of an oral contract arising out of discussions between

Gilday and Berno on November 29, 1990. Complaint ¶¶ 8-9, 21-22. The defendants contend that, because this action was not filed until February 24, 1997, this claim is barred by the six-year statute of limitations set forth in 14 M.R.S.A. § 752. The plaintiffs respond that "the breach continued at least through February 25, 1991 — that is, the day on which Pelchat was injured." Plaintiffs' Objection to Motion for Summary Judgment or Partial Summary Judgment ("Plaintiffs' Objection") (Docket No. 10) at 4. However, Maine law is to the contrary.

The cause of action for breach of contract accrues at the time of breach. *Kasu Corp. v. Blake, Hall & Sprague, Inc.*, 582 A.2d 978, 980 (Me. 1990). When the breach alleged is failure to obtain insurance coverage as requested, the breach occurs when the defendant fails to provide the insurance coverage, not when the loss occurs or when the plaintiff discovers the lack of coverage. *Id.* Here, the breach, if any, occurred on November 29, 1990, more than six years before the plaintiffs brought suit. Accordingly, Count II is barred by the statute of limitations, and the defendants are entitled to summary judgment on this count.

B. Claims Raised by Plaintiff Gilday

The defendants argue that the claims raised in the complaint are all claims of the corporate plaintiff and that Gilday, an individual, lacks standing to raise them. The plaintiffs respond that Gilday may be found liable in the future for the debts of GSI and that the statute of limitations has not yet run on any attempt that Pelchat may make to pierce the corporate veil of GSI. Thus, they assert, because "it cannot be said as a matter of law that Gilday will be held immune from personal liability in connection with Pelchat's worker's [sic] compensation claim," Gilday has standing to bring this action. Plaintiffs' Objection at 3. Again, Maine law is to the contrary.

The plaintiffs have presented no evidence that Pelchat has asserted, or even threatened to assert,

any claim against Gilday. In Maine, "the doctrine of standing serves to limit access to the courts to those best suited to assert a particular claim." *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1380 (Me. 1996). In the absence of an asserted or threatened claim against Gilday, he has "no judicially protectible interest" in whether the defendants breached a duty to GSI (Counts I and IV) or should be estopped as alleged in Count III. *Smith v. Allstate Ins. Co.*, 483 A.2d 344, 346 (Me. 1984). Any claim that Gilday might have against the defendants in the future is speculative and very far from ripe. The defendants are entitled to summary judgment on all claims asserted by Gilday.

C. The Remaining Claims Asserted by GSI

The defendants assert that the fact that GSI has been suspended by the Secretary of State pursuant to 13-A M.R.S.A. § 308 means that it lacks the capacity to bring this action. The plaintiffs maintain that GSI, while under suspension, "retains the legal capacity to sue to redress injuries done to it." Plaintiffs' Objection at 3. In support of their position, the plaintiffs cite *DiPietro v. Boynton*, 628 A.2d 1019 (Me. 1993); *Kasu Corp., supra;* and *Forbes v. Wells Beach Casino, Inc.*, 409 A.2d 646 (Me. 1979).

The plaintiffs rely on the following language in *Forbes*: "Suspension of [the defendant's] corporate charter was merely a temporary restriction of its right to conduct business in its corporate name. It did not extinguish the Corporation's property rights in its assets." 409 A.2d at 654. However, the issue in *Forbes* was not whether the corporation could sue or be sued while under suspension. The issue was whether shares of the corporation could be transferred while the corporate charter was suspended. Conducting business includes filing suit. The quoted language from *Forbes* thus actually supports the defendants' position; while it is under suspension, GSI cannot conduct business and cannot file suit.

The plaintiffs' reliance on *Kasu* is limited to a single word in the first sentence of the second paragraph of the opinion: "Plaintiff is a *defunct* corporation formerly in the business of selling and installing swimming pools." 582 A.2d at 979 (emphasis added). There is no suggestion in the opinion that Kasu Corporation was under suspension when it brought the action. In fact, pursuant to 13-A M.R.S.A. § 1122(1), a corporation that has been dissolved may commence an action to obtain a remedy within two years after its dissolution. Such a corporation would be "defunct" but not suspended and could still bring an action. The language in *Kasu* thus is of no assistance to the plaintiffs.

The plaintiffs also rely on language in *DiPietro* cautioning that the intent of state sanctions against a corporation is not to protect those who have committed torts against or breached contracts with that corporation. 628 A.2d at 1021-22. However, it is also clear by necessary inference from the Law Court's opinion in *DiPietro* that a corporation is without standing to institute or proceed with court action while it is under suspension. In that case, the Law Court held that dismissal of the claims brought by a corporation that was under suspension when it filed the action but whose corporate powers had been reinstated before the court ruled on the motion to dismiss was not warranted. *Id*. The Law Court cited with approval the holding of *Michigan Rural Dev., Inc. v. El Mac Hills Resort, Inc.*, 191 N.W.2d 733, 735 (Mich App. Div. 1 1971), that a suspended corporation is entitled to proceed with a pending lawsuit if it cures its default at any time prior to actual dismissal of the suit. *DiPietro*, 628 A.2d at 1021. Here, GSI has presented no evidence that it has cured its default and caused its suspension to be lifted. As the Law Court suggested in *DiPietro*, a statutory purpose is served by preventing a corporation from bringing suit while under suspension that is no longer served when the corporation has cured its failure to comply with statutory requirements. *Id.* at 1022. GSI has not acted to cure its failure to comply with those requirements and it is therefore without authority to prosecute this action. GSI has been on notice of this basis for the defendants' motion since October 31, 1997, the

date upon which the motion was filed, or shortly thereafter, yet it has apparently not undertaken the necessary steps to end its suspension. Such action is a necessary predicate to recovery in tort. In its absence, the defendants are entitled to summary judgment on the remaining counts of the complaint.

IV. Conclusion

For the foregoing reasons, the defendants' motion for summary judgment is **GRANTED.**

Dated at Portland, Maine, this 24th day of December, 1997.

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David M. Cohen
United States Magistrate Judge